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No. 99-8576

Supreme Court, U.S.
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In The

Supreme Court of the United States

PAUL L. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a defendant must demonstrate a "significant" increase in his sentence to satisfy the prejudice prong of the test established by *Strickland v. Washington,* 466 U.S. 668 (1984), when he alleges his counsel was ineffective at sentencing and on appeal?

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

The **National Association of Criminal Defense Lawyers** (NACDL) and the **Families Against Mandatory Minimums Foundation** (FAMM) filed this amicus brief pursuant to Rule 37.2(a) of the Rules of the Supreme Court of the United States in support of the petitioner, Paul L. Glover. Both petitioner and respondent have granted amici consent to file this brief, and amici have filed letters of consent with the Clerk of the Court.[1]

INTEREST OF AMICI

NACDL, a nonprofit corporation founded more than 40 years ago, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. In addition to its 10,000 member attorneys, including citizens of every state, NACDL has over 80 state and local affiliates with a combined membership of some 25,000. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates.

NACDL was founded to promote study and research in the field of criminal law and to disseminate and

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[1] In accordance with Supreme Court Rule 37.6, NACDL and FAMM represent that no counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL and FAMM, made any monetary contribution to its preparation and submission.

advance knowledge of the law in the area of criminal practice. NACDL also seeks to encourage integrity, independence, and expertise of defense lawyers in criminal cases. In particular, NACDL has long recognized the significant impact the Sentencing Guidelines have had on federal criminal practice and has sought through its seminars and continuing legal education programs to educate and train attorneys in this area. NACDL is aware, however, that some criminal defense attorneys have been overwhelmed by the complexity and ever changing body of appellate decisions and Sentencing Commission commentary and amendments that interpret the Guidelines. NACDL believes that the Sixth Amendment must be held to guarantee criminal defendants the right to an attorney who is both competent and current on Guidelines issues.

FAMM is a nonprofit, nonpartisan organization that conducts research, promotes advocacy and educates the public regarding the excessive cost of mandatory minimum sentencing. This cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution.

Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime. As an alternative to

mandatory sentences, FAMM supports sentencing guidelines systems that are more sensitive to differences in culpability.

Therefore, FAMM has a special interest in ensuring that the Sentencing Guidelines function as they were designed – to reduce disparities – rather than create additional injustices through inconsistent application. FAMM's Litigation Project, which was launched in 1995, provides input to the U.S. Sentencing Commission on Guidelines amendments and reform, submits amicus curiae briefs in state and federal court, assists criminal defense counsel appearing before this Court, and screens cases for possible referral to pro bono counsel. Over the past five years, the Litigation Project's staff has reviewed hundreds of letters and documents from prisoners serving mandatory minimum and guideline sentences. FAMM's legal staff has found numerous cases in which guideline errors have resulted in higher sentences. While not every case necessarily involved ineffective assistance of counsel, FAMM believes that attorney error in Guideline sentencing is a recurring problem.

SUMMARY OF THE ARGUMENT

The Seventh Circuit requires a federal district judge to refuse even to consider a federal prisoner's first post-conviction claim that his counsel's ineffective assistance caused him to receive a longer sentence, unless the length of additional incarceration is in some undefined way "significant." This requirement misunderstands this Court's ineffective assistance of counsel decisions and its

cost/benefit analysis contravenes the principles of equity and due process that underlie the Court's ineffective assistance of counsel and habeas corpus jurisprudence. Amici also contend that the Seventh Circuit's approach turns a blind eye to real problems of attorney competence in the Sentencing Guidelines era. For these reasons, the "significant prejudice" test must be overturned and this case remanded for reconsideration and ultimately for resentencing.

ARGUMENT

I. THE SEVENTH CIRCUIT "SIGNIFICANT PREJUDICE" TEST CONTRAVENES THE COURT'S INEFFECTIVE ASSISTANCE OF COUNSEL JURISPRUDENCE.

Just last Term in *Williams v. Taylor*, 529 U.S. —, 120 S. Ct. 1495, 1511 (2000), the Court concluded that the Virginia Supreme Court "erred in holding that . . . *Lockhart v. Fretwell*, 506 U.S. 364 (1993), [had] modified or in some way supplanted the rule set down in *Strickland*." 120 S. Ct. at 1511. The Seventh Circuit committed the same essential error in *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), where it created the "significant prejudice" test of which petitioner complains.

This case can best be understood in the context of the Court's ineffective assistance of counsel jurisprudence. The Court has emphasized that "the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.' " *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)). Therefore, " 'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.' " *Lockhart*, 506 U.S. at 369 (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

The established means by which a defendant proves that the fundamental fairness of the proceeding was undermined by his counsel's error is the familiar two-part test set forth in *Strickland*. 466 U.S. at 690. This test applies to all phases of attorney performance; from pretrial investigation through direct appeal. *Roe v. Flores-Ortega*, 528 U.S. —, 120 S. Ct. 1029, 1034 (2000) (*Strickland* governs ineffective assistance on direct appeal); *Smith v. Robbins*, 528 U.S. —, 120 S. Ct. 746 (2000) (same). *Strickland* requires that the defendant show first, that his counsel's performance was deficient and second, that the deficiency prejudiced the defendant. In *Strickland* and its progeny, prejudice has consistently been defined as whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Roe v. Flores-Ortega*, 120 S. Ct. at 1037; *Smith v. Robbins*, 120 S. Ct. at 764.

As recently as last Term, the Court stated that the original *Strickland* test is sufficient to resolve virtually all ineffective assistance of counsel cases. *Williams v. Taylor*, 120 S. Ct. at 1511. Nevertheless, the Court has also consistently held that several situations are so egregious that

prejudice should be presumed because "during the judicial proceeding [the defendant] was – either actually or constructively – denied the assistance of counsel altogether. *Roe v. Flores-Ortega*, 120 S. Ct. at 1038. *See Geders v. United States*, 425 U.S. 80 (1976) (government interference with right to counsel); *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (actual conflict adversely affecting performance); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (same). At the other end of the spectrum, the Court has twice recognized unique circumstances under which "it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.' " *Williams v. Taylor*, 120 S. Ct. at 1512. In these two isolated cases, although the defendant could arguably show that had his counsel acted differently, there would have been a different outcome at the time, upon further examination, the Court concluded that the defendant had not actually been deprived of a "substantive or procedural right to which the law entitles him." *Id.* at 1513.

In the first of these exceptional cases, *Nix v. Whiteside*, 475 U.S. 157 (1986), although the defendant's perjured testimony might have induced the jury to acquit him, the Court concluded that it was not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. The Court held that because perjury and assisting perjury are forbidden by the criminal law and attorney ethical codes, the defendant had no right of any kind to commit perjury and therefore, he could not have been prejudiced by his attorney's refusal to assist him do so. *Id.* at 994-97. In essence, *Nix* simply implements *Strickland's* admonition that a

defendant has no "entitlement to the luck of a lawless decisionmaker." *Id.* at 695.

Also considered to be in this special category is *Lockhart v. Fretwell*, 506 U.S. 364 (1993). Although counsel failed to bring a relevant and helpful precedent to the court's attention at sentencing, that opinion was later overruled. Thus, the Court held the defendant would be receiving a windfall if given the benefit of the now overruled and thus presumptively erroneous case. The Court stated in *Lockhart* that an analysis that focused "solely on mere outcome determination, without attention to whether the result was fundamentally unfair or unreliable, is defective." 506 U.S. at 842. This sentence, taken out of context, is the fount of the erroneous doctrine under review here. In establishing its "significant prejudice" test, the Seventh Circuit failed to recognize that only because of the unique facts of *Nix* and *Lockhart* did the Court conclude that what on the surface looked like prejudice, did not actually amount to an unjust result because the defendant was not legally entitled to do the act or rely on the legal point which would have changed the outcome. Absent such an unusual scenario, *Strickland's* "reasonable probability of a different outcome" is the only inquiry required to determine if a petitioner was prejudiced by his counsel's errors.

Last Term in *Williams*, the Court explicitly emphasized that *Nix* and *Lockhart's* prejudice analysis is irrelevant to the ordinary ineffective assistance of counsel case. Quoting Justice O'Connor's concurrence in *Lockhart*, the Court emphasized that *Lockhart's* focus on whether the prejudice alleged, *i.e.*, the likely difference in the outcome, truly was the result of some fundamental unfairness:

> will in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*. The determinative question – whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' – remains unchanged.

Id. (citations omitted). Moreover, *Williams* makes absolutely clear that the unusual feature of both *Nix* and *Lockhart* was an attempt by the defendant to "demonstrate prejudice based on considerations that, as a matter of law, ought not to inform the inquiry." 120 S. Ct. at 1513 n.18. Moreover, other than a defendant's desire to commit perjury in his own defense, as in *Nix*, or a reliance on overruled precedent, as in *Lockhart*, the Court has never suggested any other situation that would justify a "departure from a straightforward application of *Strickland*" and its definition of prejudice. *Id.* at 1513. This is because, as *Williams* went on to say, "fundamental fairness," the overarching concern in *Strickland*, is obviously undermined whenever "the ineffectiveness of counsel does deprive the defendant of a substantive or procedural right to which the law entitles him." 120 S. Ct. at 1513.

In *Williams*, the Virginia Supreme Court interpreted *Lockhart* to require some kind of inquiry into fundamental fairness even when a lawyer "was ineffective and that his ineffectiveness probably affected the outcome of the proceeding." *Id.* at 1513. Therefore, that state court refused to grant Williams' petition even though his counsel failed to present readily available evidence that established a reasonable probability that the jury would not have voted for the death penalty. In reversing, this Court held that

barring some effort by the defendant to rely on a factor that as a matter of law may not be considered, the *Strickland* formulation – a reasonable probability of a difference in outcome – is sufficient to meet the prejudice prong of this Court's ineffective assistance of counsel test. 120 S. Ct. at 1515.

With this background, the Seventh Circuit's error in this case is clear. Like the Virginia Supreme Court's erroneous decision in *Williams*, *Durrive* read *Lockhart* to "reject the equation between causation and prejudice" in all ineffective assistance of counsel cases. *Durrive*, 4 F.3d at 550. Thus, the Seventh Circuit asserted in *Durrive* that in addition to an unprofessional error that resulted in prejudice, the prisoner must also show that these errors in some way "so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." 4 F.3d at 550 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)). Thus, *Durrive* added a second step to the prejudice prong in every ineffectiveness assistance of counsel petition; first, the defendant must show that there is a reasonable probability that the result would have been different but for counsel's unprofessional error, and second, some vague "fundamental fairness" inquiry is conducted. To the contrary, *Williams* makes clear that in virtually all cases, the *Strickland* definition of prejudice is sufficient exactly because an unprofessional error that was reasonably likely to have affected the outcome is an error "that undermine[s] confidence in the fundamental fairness" of the lower court proceeding. 120 S. Ct. at 1503. Therefore, the Seventh Circuit's addition of another layer of inquiry

to the prejudice prong is not only unsupported by precedent, it is also redundant and illogical.

In this case, there is no question that under *Williams*, only the *Strickland* test was required to evaluate petitioner's claim for relief. Here, counsel failed to apprise the court of appeals of a controlling decision announced while his appeal was pending. If the appellate court had been aware of this precedent, which continues to be in effect to this date (compare *Lockhart)*, his appeal would have been granted, his sentence vacated, and the case would have been remanded for re-sentencing. Under *Smith v. Robbins*, 120 S. Ct. at 764, such a showing, without more, constitutes prejudice in an ineffective assistance of counsel on appeal case. *Id.* (failure to file merits brief is judged by same *Strickland* standard that applies to all ineffective assistance of counsel on appeal cases – that a defendant must show "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal"); *see also United States v. Mannino*, 212 F.3d 835, 844 (3d Cir. 2000) ("The test for prejudice under *Strickland* is not whether petitioners would likely prevail upon remand, but whether we would have likely reversed and ordered a remand had the issue been raised on direct appeal."). Therefore, petitioner need not, for example, show that after winning reversal he would have achieved a particular result in the district court on remand.[2] No *Nix* or

[2] At re-sentencing, petitioner will, however, also be able to show that under the correct application of the Guidelines, his guideline range should be lower, thereby reducing his actual sentence by six to twenty-one months. Because the government did not ask for an upward departure and the court sentenced petitioner near the low end of the sentencing range, if petitioner's sentencing range had been correctly set at 63-78 months, everything in the record suggests that petitioner's actual sentence would have been within this lower range at the time of the original sentencing.

Lockhart factors exist in this case to suggest that petitioner's claim was tainted or that he would obtain a windfall in granted relief from his illegal sentence. Thus, under *Strickland* and all its progeny, including *Nix*, *Lockhart*, and *Williams*, petitioner has established the requisite prejudice, which proves that his appeal was fundamentally unfair because of his counsel's error.

II. THE SEVENTH CIRCUIT "SIGNIFICANT PREJUDICE" TEST UNDERMINES CORE PRINCIPLES OF THE FEDERAL WRIT OF HABEAS CORPUS.

In addition to imposing an unwarranted second stage of inquiry in ineffective assistance of counsel cases, the Seventh Circuit further concluded that only unprofessional errors that "produce a large effect on the sentence," *Durrive*, 4 F.3d at 548, are sufficient to trigger the Sixth Amendment's protection. This holding finds absolutely no support in this Court's decisions, and in fact, is clearly contrary to both the plain language and jurisprudence of the federal habeas corpus writ.

Section 2255 of title 28, U.S. Code states that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

> sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Obviously, a Sixth Amendment claim of ineffective assistance of counsel qualifies as a violation of the Constitution. Additionally, an improper guideline sentence violates both the "laws of the United States" and the "in excess of the maximum authorized by law" clauses of § 2255. Under 18 U.S.C. § 3551(a) and § 3553(b), a district court "shall" impose a sentence within the guideline range as determined by the Sentencing Guidelines. Thus, when a prisoner is erroneously given a sentence above the correct guideline range, his sentence is both illegal and in excess of the statutory maximum sentence permissible under law, that is, the Sentencing Reform Act of 1984. However, regardless of which of these three clauses of § 2255 is violated by this petitioner's sentence, § 2255's plain language could not be clearer about the action required. If a prisoner is in custody in violation of a provision of § 2255, a court must entertain the merits of the petition and "vacate, set aside or correct the sentence." Nothing in § 2255 authorizes a district court to engage in the Seventh Circuit's cost/benefit analysis that weighs the burden of litigating these claims on the courts against some arbitrary value placed upon the length of an illegal sentence. In fact, some of the courts of appeals have correctly concluded that prisoners can demonstrate

the requisite prejudice under *Strickland* even when a sentencing error resulted in no additional time but might have negative collateral consequences. *Jackson v. Leonardo*, 162 F.3d 81, 86-7 (2d Cir. 1998) (even though there was no actual effect on his sentence, the possibility of an enhanced sentence under a repeat offender statute if petitioner was convicted of a subsequent offense constituted sufficient prejudice under *Strickland*); *United States v. Palomba*, 31 F.3d 1456, 1464-66 (9th Cir. 1994) (similar).

The Seventh Circuit's significant prejudice test also undermines the central principles of equity, due process, and substantive justice that underlie the federal equivalent of the Great Writ of habeas corpus. The Court has held that an error in "the very duration of a [prisoner's] physical confinement" lies at the "core" of the habeas corpus writ. *Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973). Nor can it be questioned that a prisoner's "substantial rights are affected if his prison sentence is longer than it should have been." *United States v. Granados*, 168 F.3d 343, 346 (8th Cir. 1999). It is also "beyond dispute that a sentencing calculation may violate the due process clause of the Fifth Amendment if there is a possibility that the sentence imposed may have been based on legal and/or factual error." *United States v. Mannino*, 212 F.3d at 846 (citing *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948)). Moreover, the "Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). If a defendant comes to a court with clean hands and a claim that merits relief under a statute, equity mandates that such relief be granted. The Seventh Circuit ignores these principles and trivializes petitioner's unlawfully lengthened prison term by reference

to even greater sentencing injustices. Such a comparison is an affront to yet another fundamental tenet of our criminal justice system – the principle of individualized justice. *See Stack v. Boyle*, 342 U.S. 1, 9 (1951) (Jackson, J., concurring) ("[E]ach defendant stands before the bar of justice as an individual.").

Without statutory or constitutional support, the Seventh Circuit's reformulation of the *Strickland* test and its requirement of "significant prejudice" rest capriciously on the court's explicit desire to limit post-conviction motions to correct sentencing errors. Its policy arguments, however, are based on a failure to recognize the status of the Sentencing Guidelines as "law" under § 2255, and ultimately, are founded on a cost/benefit approach to justice that is inconsistent with the core notions of liberty protected by the Sixth Amendment and Due Process Clause.

In *Durrive*, the Seventh Circuit claimed that "[b]efore the advent of the Sentencing Guidelines, no one would have dreamed that choices influencing the term of imprisonment within such a narrow range could be relitigated on collateral attack." 4 F.3d at 550. Nevertheless, the Sentencing Reform Act of 1984 and the United States Sentencing Guidelines did dramatically change sentencing decisions by bringing them into the light where they can be examined by appellate courts, both on direct appeal as provided by statute, *see* 18 U.S.C. § 3742, and on collateral review under § 2255. *See generally Mistretta v. United States*, 488 U.S. 361 (1989). While before the Guidelines, it was generally nearly impossible to determine how a slight error by counsel had affected a judge's broad

sentencing discretion under an indeterminate system, the Guidelines have limited a sentencing judge's discretion, such that, in some instances, the court does little more than execute a ministerial calculation. *See* Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920 (1987) ("Through commentary and specific guideline provisions, the Commission offers objective criteria to guide the exercise of structured discretion by the judge."); *see also United States v. Severson*, 3 F.3d 1005, 1013 (7th Cir. 1993) ("The Sentencing Guidelines brought a formulaic method to sentencing, eliminating much of the district court's discretion. . . . "); Kate Stith & Jose Cabranes, FEAR OF JUDGING 167 (1988) ("[I]n the typical case, the judge is supposed to perform an automaton's function by mechanically applying stark formulae set by a distant administrator."). Thus, in a discrete set of cases such as petitioner's, it is now possible to determine to an actual range of months, the impact that counsel's unprofessional errors had on a sentence.

The Seventh Circuit conflates these clear cut cases in which a legal error relating to the Sentencing Guidelines resulted in a demonstrable sentence increase with those cases involving factual determinations (*e.g.*, drug quantity) that are entitled to appellate deference. *See* 18 U.S.C. § 3742(e). Instead of recognizing that under the Guidelines there are now sentencing decisions with different levels of opacity, the Seventh Circuit lumps all these cases together to raise the specter that "almost any error at sentencing may be recast as a challenge to counsel" and that the "significant prejudice" test is necessary to prevent ineffective assistance of counsel claims from becoming "means of

vindicating on collateral attack all manner of arguments under rules and statutes." *Durrive*, 4 F.3d at 550.

It is on precisely this issue that the Fifth Circuit, which originated the "significant prejudice" test for indeterminate sentencing cases, rejected the Seventh Circuit's reasoning in *Durrive*. The Fifth Circuit wrote: "We qualified this significant prejudice rule in *dictum*: 'one foreseeable exception to this requirement would be when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing – such as an automatic increase for a "career" offender or an enhancement for use of a handgun during a felony – which would have not occurred but for counsel's error.' " *United States v. Phillips*, 210 F.3d 345, 351 (5th Cir. 2000).

In any event, the Seventh Circuit's cost/benefit analysis places an inappropriate premium on the burden of collateral review of attorney errors at sentencing on the court system. Mr. Glover's petition is his first § 2255 motion and his first opportunity to present his ineffective assistance of counsel claim.[3] Thus, this is not a successive habeas petition to which the Court and Congress have erected additional barriers to relief. *See* Antiterrorism and Effective Death Penalty Act of 1996; *Felkner v. Turpin*, 518 U.S. 651 (1996). Nor is this an appeal from a state conviction for which the Court has enunciated restraints on federal review "grounded in concerns of comity and federalism." *Edwards v. Carpenter*, 529 U.S. —, 120 S. Ct. 1587,

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[3] Petitioner was represented by the same counsel at trial and on appeal. *See also Lonchar v. Thomas*, 517 U.S. 314, 330 (1996) (ineffective assistance claims "often cannot be raised on direct appeal").

1591 (2000) (quoting *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)). Moreover, unlike in *Durrive* where the defendant complained about the court's failure to follow the procedures of Rule 32 to the letter, which might or might not have increased his sentence, there is no question here that petitioner is actually serving an illegal sentence, that is, a sentence in excess of that authorized by the Sentencing Guidelines and its enabling legislation.

Certainly, amici think it is useful to point out that the Seventh Circuit's floodgates argument overlooks the fact that many ineffective assistance of counsel cases never reach the prejudice prong because the defendant is unable to meet the exacting standard that counsel's performance was so deficient as to fall below prevailing standards of professional norms. More important, however, amici believe that the Seventh Circuit's blatant cost/benefit analysis offends basic notions of due process. While those on the front lines of the criminal justice system, and even at the level of the courts of appeal, may sometimes see themselves as performing triage surgery in an overburdened system, this Court cannot sanction rules that disregard fundamental injustices just to keep the cases moving. A term of imprisonment carries with it various kinds of intentional and unintended dehumanization, humiliation, and brutalization, for when a prisoner enters prison, "He is thrown into a violent whirlwind of moral, mental and physical destruction." Jack Henry Abbott, IN THE BELLY OF THE BEAST 111 (1981). *Cf. Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989). Moreover, these dangers are present each and every year, month, day, and hour of prison time. As this famous prison memoir put it, "It hurts every day. Every day takes me

further from my life. And I am not even conscious of how my dissolution is coming about. Therefore, I cannot stop it." *Id.* 405.

In this case, a constitutional error has occurred. Nothing in this Court's jurisprudence supports the Seventh Circuit's misguided attempt to impose a vague cost/benefit approach that purports to weigh the value of additional days and months of incarceration upon Mr. Glover against the institutional costs associated with fully litigating a claim of ineffective assistance of counsel. In such a case as this, there cannot be "too much justice."

III. THE SEVENTH CIRCUIT "SIGNIFICANT PREJUDICE" TEST EXACERBATES A SIGNIFICANT PROBLEM IN THE REPRESENTATION OF FEDERAL CRIMINAL DEFENDANTS.

Amici contend that the Seventh Circuit's "significant prejudice" test camouflages rather than corrects serious issues concerning defense attorney competence that have arisen since the advent of the Sentencing Guidelines. Prior to the Sentencing Guidelines, indeterminate sentencing, that gave judges wide sentencing discretion, was the rule in federal criminal cases. *See Apprendi v. New Jersey*, 530 U.S. —, 120 S. Ct. 2348, 2358 (2000).

Congress moved from an indeterminate sentencing regime to the Sentencing Guidelines primarily in an attempt to improve fairness and to achieve a concomitant decrease in sentencing disparity. *Apprendi*, 120 S. Ct. at 2394 (O'Connor, J., dissenting); *id.* at 2396-400 (Breyer, J., dissenting). Achieving a reduction in sentencing disparity

could not come, however, without an increase in the transaction costs of sentencing decisions. Some costs are obvious. Pre-sentence reports are longer and more complex, as are many sentencing hearings, which deal with heretofore irrelevant specifics such as exact drug quantity or the degree of cooperation. Obviously, the direct appeal of sentences provided for by the Sentencing Reform Act of 1984 has increased the burden on appellate courts to deal with the intricacies of sentencing issues. Certainly, as well, the Sentencing Commission's efforts to write and constantly amend the Guidelines have been substantial.[4]

These transaction costs in turn created a ripple effect which increased the burden on the participants in the criminal justice system. Sentencing now takes place in a technical and constantly evolving environment. Formerly, defense counsel's role was essentially to marshal whatever facts might sway the court to exert leniency towards the defendant, often no more than an attempt to put a human face on their clients; the Guidelines now require of counsel technical expertise and constant vigilance to change to represent their clients competently. It is not an exaggeration to say that familiarity and facility with the Guidelines has become a significant part of federal criminal practice. *See United States v. Soto*, 132 F.3d 56, 59 (D.C.

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[4] Since the Guidelines were first published in 1987, the amendments and commentary now take up more room than the sentencing rules themselves. Mary Pat Flaherty & Joan Biskupic, *Despite Overhaul, Federal Sentencing Still Misfires*, Wash. Post, Oct. 6, 1996, at A21. In the 2000 edition, the current guidelines and commentary occupy 424 pages, while the amendments alone (Appendix C) comprise 612 pages.

Cir. 1997) ("Familiarity with the structure and basic content of the [Sentencing] Guidelines . . . has become a necessity for counsel who seek to give effective representation.") (quoting *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) (Becker, J.)).

However, while the Guidelines are technical, amici contend they are not too technical for criminal practitioners to understand. While sometimes difficult to work with, they are no more difficult than other regulatory schemes that attorneys are expected to master, such as the tax code. In fact, even within the criminal law, the complexity of, and interrelationships between, the Guidelines, the Sentencing Commission's commentary, and the appellate decisions interpreting the Guidelines are not significantly different from the statutes, administrative commentary, and court decisions that regulate electronic eavesdropping or the rules of evidence. What the Guidelines require from counsel is simply the same degree of preparation, diligence, and continuing education with which criminal defense attorneys, and indeed all practicing attorneys, approach the technical aspects of their chosen fields of procedural and substantive law. In other words, the Guidelines require competence and a commitment to take sentencing advocacy as seriously as all other areas of representation of a federal criminal defendant, or any other client.

The sad reality, however, is that some criminal defense attorneys have not made the requisite commitment to master the still relatively new sentencing landscape under the Guidelines. In addition, with hundreds of amendments and appellate court decisions interpreting the Guidelines, sentencing is now full of pitfalls for the

unwary practitioner. *See* Stith & Cabranes, FEAR OF JUDGING 128 (citing studies that reflect "significant variation in Guidelines competence among defense attorneys"); Mary Pat Flaherty, *Innocent Errors Add Years to Terms of Guilty Parties*, Wash. Post, Oct. 6, 1996, at A21 (detailing mistakes in sentences that survived the scrutiny of attorneys, probation officers, and judges and quoting federal public defender who spent three and a half years checking defendants' sentences to conclude that even math errors are made all the time.).

Thus, there is substantial evidence that not all defense attorneys have risen to the challenges presented by the Guidelines. The Seventh Circuit, with its "significant prejudice" test, seeks to sweep cases like Mr. Glover's under the rug – leaving no forum where his unlawful sentence or counsel's errors can be addressed. Such a situation is not only unjust, it is unhealthy for the criminal justice system. For the Guidelines to work as they were designed, competence and diligence are required from all participants in the federal criminal justice system. This is now apparent even to one of the Seventh Circuit judges who joined *Durrive* but who now believes (joined by two other Circuit Judges) that the "significant prejudice" test should be overturned. Compare *Durrive, supra*, with *Martin v. United States*, 109 F.3d 1177 (1996) (*per curiam*); *id.*, at 1179 (1997) (Rovner, J., dissenting from denial of rehearing en banc). In addition to criticizing the doctrinal foundation for the "significant prejudice" test, Judge Rovner writes that "[w]hat the court has effectively done, it seems to me, is to lower dramatically the quality of advocacy vis á vis sentencing

that will satisfy the Sixth Amendment. . . . [T]he defendant is entitled only to an attorney who does not overlook 'grave errors' having a 'large effect' on the sentence." *Id.* at 1184-85. Thus, rather than encouraging defense counsel (and other sentencing participants for that matter) to stay current on Guidelines issues and amendments, the Seventh Circuit rule reassures the weakest members of the federal criminal bar that "minor" errors resulting from incompetence or laziness will not even be reviewed.

Amici respectfully urge the Court to confront this issue and require the same competence from counsel on sentencing issues as the Court has done for other aspects of criminal representation – from factual investigation through trial and appellate work. So long as Congress believes that the Guidelines serve to reduce disparity and promote fairness in sentencing, the Court should insist that the criminal defense bar be held to a standard that ensures that defendants will serve the time the law requires but not a day more.

CONCLUSION

Because the Seventh Circuit has condoned the continued incarceration of petitioner for at least several months beyond the extent of the punishment permitted by federal law, despite its assumption that his sentence was the result of error of constitutional magnitude, the "significant prejudice" test should be overruled and this case remanded for further consideration and ultimately for resentencing.

Respectfully submitted,

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